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NO. 34785-7-II

STATE OF WASHINGTON

CM

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

K.D.H.,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 05-8-01064-8

HONORABLE CHRISTINE A. POMEROY, Judge

RESPONDENT'S BRIEF

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Deputy Prosecuting Attorney
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

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A. STATEMENT OF THE ISSUES

1. Whether all the essential elements of violation of sex offender registration appear in any form, or by fair construction can be found, in the First Amended Information.

2. Considering the evidence in the light most favorable to the State, whether there was sufficient evidence for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant was guilty of violation of sex offender registration.

B. STATEMENT OF THE CASE

In 2004, the respondent K.D.H. pled guilty in Thurston County Juvenile Court to one count of child molestation in the first degree. He was ordered to comply with sex offender requirements.

CP 21. When the respondent was released from custody in July, 2004, he registered with the Thurston County Sheriff's Office. Trial RP 31-32. At that time, Sheriff's Detective Daryl Leischner went over the requirements of sex offender registration step by step with the respondent. Trial RP 32.

Thereafter, the respondent reported a change of address to the Sheriff's Office on five

occasions. Trial RP 33. As of the summer of 2005, the respondent was reportedly residing at an address in Rainier. Trial RP 41-43.

High-school student David Bolin met the respondent, K.D.H., in the summer of 2005. During that summer, K.D.H. asked David if K.D.H. could stay for awhile at David's residence on Maxine Street in Lacey. Trial RP 107-108. With the permission of David's parents, the respondent resided at David's home for a month at the most during July-August, 2005. Trial RP 24-25 and 108-109. At the end of that time period, David's mother, Deann Bolin, told the respondent that he had to leave. Trial RP 25-26.

Thereafter, the respondent never again resided at the Bolin home. Trial RP 26 and 108-110. The respondent did stay overnight a few times without the permission of David's parents. Trial RP 109-110. However, David himself moved out of the family home and lived elsewhere from mid-November to the end of December, 2005. Trial RP 112-113, 117.

On September 26, 2005, the respondent reported to the Thurston County Sheriff that he had moved to an address on Wilson Street in Olympia. Trial RP 42-43. This was the residence of the respondent's sister. Trial RP 87, 90. This address was in the Olympia School District. However, the respondent wished to go to school in Lacey's North Thurston High School because his girl friend was in school there. Trial RP 99.

The respondent asked David if the respondent could register for school at David's house, since that residence was in the district for North Thurston High School. Trial RP 108, 111. Deann Bolin refused to permit this, and David informed the respondent of Deann's decision. Trial RP 111-112. Nevertheless, the respondent reported to North Thurston High School that he was living at David's residence on Maxine Street, and he continued to attend that school. Trial RP 18.

On October 24, 2005, the respondent reported to the Thurston County Sheriff's Office that he had moved to the Maxine Street address. Trial RP

34, 43. This was the last notification the respondent provided to the Sheriff's Office prior to December 13, 2005 concerning any change of address. Trial RP 33-37.

As of November 12, 2005, Lacey Police Sergeant David Campbell was working as a school resource officer at North Thurston High School. On November 12th, Campbell contacted the respondent in regard to a report of an assault. Campbell questioned the respondent about his current residence. The respondent admitted that he was actually living in a trailer on the side of the house of his mother's boy friend in East Olympia. The respondent explained that he had lived at the Maxine Street address for a few weeks earlier in the year, but that he had not lived there for some time. Trial RP 19.

Lacey Police Jeremy Knight made a contact at the Maxine Street address and learned that the respondent was not living there. In early December, Knight informed Leischner of what he had learned. Campbell also informed Leischner of what

the respondent had told him. Trial RP 35-36. On December 12, 2005, Leischner made phone contact with Deann Bolin and confirmed that the respondent had not been living at the Maxine Street address in the period since 10-24-05. Trial RP 37. The respondent was then arrested for violation of sex offender registration. Trial RP 37-38.

On December 15, 2005, an Information was filed in Thurston County Juvenile Court charging the respondent with one count of violation of sex offender registration. CP 2. A First Amended Information was then filed on March 30, 2006, which retained the original charge, but broadened the alleged period of time in which the offense occurred to October 25, 2005 through December 13, 2005. CP 3.

Trial in this matter began on March 30, 2006, before the Honorable Judge Christine Pomeroy. Through Deann Bolin, David Bolin, Lacey Police Sergeant David Campbell, and Thurston County Sheriff's Detective Daryl Leischner, evidence was presented by the State consistent with the above

recitation of facts. Six witnesses testified for the defense.

Rachel Benavides testified she was the girl friend of the respondent. Trial RP 51. She claimed around October 24, 2005 and thereafter the respondent stayed at David Bolin's residence on Maxine Street, and that she sometimes stayed there as well. Trial RP 52-53. She stated that while the respondent sometimes stayed at other locations, David's residence was the main place he stayed at. Trial RP 57-58. According to Benavides, David's mother was aware of this and permitted it. Trial RP 54-55.

Initially, Benavides claimed that in November, David's sister had caught the respondent and Benavides in bed together in one of the rooms downstairs, and David's mother had ordered them to leave. She then admitted this might have happened in the summer. However, she then claimed David's mother still let them both stay at the house in the fall. Trial RP 59-63.

Mike Patterson testified that the respondent

was his best friend. Trial RP 64. Mike claimed that the respondent had stayed at David Bolin's residence for a few weeks starting in October. Mike said he did not know exactly how many weeks the respondent had stayed there. Trial RP 65-66 and 69-71.

Matt Patterson, Mike's brother, testified that he was also a good friend of the respondent. He stated that he was present on four or five occasions when the respondent stayed at David Bolin's residence in late October and early November. Trial RP 80-82.

Justin Jensen testified he was the boy friend of the respondent's mother. Trial RP 72. He stated he had been in jail from October 13, 2005 until November 2nd of that year. When he got out, he would often pick up the respondent after school and drop him off at the residence of David Bolin. Trial RP 75-77. Jensen claimed that the respondent then moved to the residence of Jensen's brother on Olympia Avenue just before Thanksgiving. Trial RP 79.

Amber Moore is the sister of the respondent. She stated that the respondent had lived with her on Wilson Street from mid-August, 2005 until late October, 2005. Trial RP 90. Then, according to Moore, he had left her residence with the intent of staying at David Bolin's residence. She stated she had dropped him off there a few times. Trial RP 87-88. Moore stated that the respondent had then moved to a residence on Olympia Avenue, but she could not say when that had occurred. Trial RP 92-93.

Gail Hanna is the respondent's mother. She stated that the respondent had not stayed at David Bolin's residence in the summer. Trial RP 101. However, according to Hanna, the respondent did stay there for awhile beginning in October, 2005. Trial RP 94. Hanna stated she had discussed the matter with David's mother at that time, and that David's mother had permitted the respondent to come and live with them for awhile. Trial RP 94. Hanna also testified that the respondent then moved to the Olympia Avenue address around

Thanksgiving. Trial RP 100.

In rebuttal, Deann Bolin testified that she had spoken to Hanna about the respondent staying at Bolin's residence, but that the conversation took place in the summer. Trial RP 122. She also noted that her husband had been in the habit of going to the downstairs of the residence each night to make sure everything was locked up, thereby rebutting the defense contention that the respondent could have been staying at the Bolin residence without the knowledge of David Bolin's parents. Trial RP 123.

The trial court found that the State had proved the charge and found the respondent guilty of violation of sex offender registration. Trial RP 136. Findings of Fact and Conclusions of Law were entered on May 24, 2005. The court found that the State's witnesses were credible, and that the respondent had not resided at the Maxine Street address during the period of October 25, 2005 through December 13, 2005. CP 20-23.

C. ARGUMENT

1. All of the essential elements of violation of sex offender registration can be found by fair construction in the First Amended Information in this case.

The defendant contends that the First Amended Information in this case failed to set forth all of the essential elements of the charge. This claim has been raised for the first time on appeal.

Under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution, a charging document must set forth all of the essential elements of the alleged crime so that a criminal defendant can be apprised of the nature of the charge and can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of the charging document is raised for the first time on appeal, the court will engage in a liberal construction of the document in order to determine its validity. Under that liberal analysis, the appellate court examines: (1) whether the essential elements of

the alleged crime appear in any form in the charging document, or whether they can be found by fair construction; and if so, (2) whether the defendant can show that he was nonetheless actually prejudiced by the inartful language used in the document. Kjorsvik, 117 Wn.2d at 105-106. In the present case, the defendant on appeal (a juvenile, and so hereinafter referred to as respondent) has not alleged any actual prejudice, and so only the first prong of the above-stated test is pertinent here.

In charging the respondent with one count of Violation of Sex Offender Registration, the First Amended Information read as follows:

COUNT 1 - VIOLATION OF SEX OFFENDER REGISTRATION, RCW 9A.44.130(10)(a) - Class C Felony:

In that the Respondent, [K.D.H.], in the State of Washington, on or about October 25, 2005 through December 13, 2005, having been previously convicted of a sex offense, to wit: Child Molestation in the First Degree, and therefore required to register as a sex offender in Washington, did knowingly fail to comply with sex offender registration requirements.

CP 3.

The defendant was charged pursuant to RCW 9A.44.130(10)(a). That statutory provision is as follows:

A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection 9(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection 9(a) of this section.

Thus, this provision sets forth two essential elements of the crime of Violation of Sex Offender Registration. Taken in reverse order, those elements are: (1) that the respondent was previously convicted of a felony sex offense in Washington or had an equivalent federal or out-of-state conviction, and (2) knowingly failed to comply with any of the registration or notification requirements of RCW 9A.44.130. Applying a liberal construction to the First Amended Information in this case, as is required, it is apparent that both essential elements of

Violation of Sex Offender Registration can be found there by fair construction.

The charging document stated that the respondent had previously been convicted of child molestation in the first degree. Subsection 9(a) of RCW 9A.44.130 defines a felony sex offense as follows, in pertinent part:

- . . . (a) "Sex offense" means:
- (i) Any offense defined as a sex offense by RCW 9.94A.030; . . .

The term "sex offense" is defined in RCW 9.94A.030 as follows, in pertinent part:

- . . . "Sex offense" means:
- (a)(i) a felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11); . . .

RCW 9.94A.030(41)(a)(i). The crime of first-degree child molestation is a Class A felony violation of RCW 9A.44.083.

Thus, the First Amended Information alleged that the respondent had been convicted of a felony sex offense, that consequently he had to register as a sex offender in Washington, and that he had failed to comply with his registration requirements. By fair construction, this

recitation set forth the elements identified in RCW 9A.44.130(10)(a).

The defendant contends that the Information had to specify the alleged facts which constituted the violation. Those allegations were: (1) that the defendant had notified the Thurston County Sheriff's Office of a change of address on October 24, 2005; (2) that as of December 13, 2005, he had not updated this notification in any way; and (3) that he did not actually reside at the address he had claimed during the period of October 25, 2005 to December 13, 2005.

The respondent argues that the State's theory of the case could have been expressed in the First Amended Information by language stating that the respondent failed to notify the Thurston County Sheriff's Office within 72 hours of moving his residence. However, that language would not have accurately stated the facts alleged by the State.

Under RCW 9A.44.130, having been convicted of first-degree child molestation, the respondent was under the initial obligation to register upon

release and provide his current address. RCW 9A.44.130(1)(a) and (3)(a). He was then required to notify the county sheriff whenever he moved, and to do so within 72 hours if he moved within the same county. RCW 9A.44.130(5)(a). The purpose of these requirements is to provide law enforcement with an address where they can contact a sex offender, so that law enforcement can protect the community against sex offenders who re-offend. State v. Stratton, 130 Wn. App.760, 765, 124 P.3d 660 (2005). Thus, implicitly the statute required that this respondent provide accurate information to the county sheriff concerning his current residence.

Under the State's evidence, the respondent either knowingly falsified an address notification on October 24, 2005, whether within 72 hours of moving or not, or knowingly failed to provide accurate notice of his true residence within 72 hours of moving there. Either way, he had knowingly failed to comply with his registration requirements, as alleged in the charging document.

The defendant contends that the charging document must set forth both the essential elements of the charged crime and the conduct which allegedly constituted those elements of the crime, citing Auburn v. Brooke, 119 Wn.2d 623, 629-630, 836 P.2d 212 (1992). While that may ideally be the case, it is not the test of sufficiency which is applicable when an Information is first challenged on appeal.

In that latter instance, the court first determines whether the essential elements are present by fair construction. State v. Moavenzadeh, 135 Wn.2d 359, 956 P.2d 1097 (1998). If so, any vagueness in the statement of the charge becomes an issue only if the respondent claims prejudice as a result. The court can then look beyond the charging document itself to determine if the respondent received timely notice of the nature of the charges in some other fashion. Kjorsvik, 117 Wn.2d at 106. However, we do not reach such an inquiry in this case because there has been no allegation of prejudice.

At the most, the argument of the respondent in this case only indicates that the statement of the essential elements in the First Amended Information was inartfully general, not that any element was omitted.

In State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000), Tresenriter was charged with second-degree possession of stolen property. On appeal, he contended that the charging document was insufficient because it did not detail what the alleged property was, where the property was located when he allegedly possessed it, or if it was connected to the theft and burglary also charged. The appellate court determined that none of these matters were elements of the crime, that at best the allegation may have been too general, and that in such an instance, Tresenriter's remedy would have been to ask for a bill of particulars, and so the charging document was sufficient. Tresenriter, 101 Wn. App. at 494-495; see also State v. Leach, 113 Wn.2d 679, 687, 782 P.2d 552 (1989).

The same result should apply in the present case. The elements of a violation of sex offender registration can be found in the First Amended Information by fair construction, and any need for greater detail concerning the nature of the alleged failure to comply could have been addressed by a request for a bill of particulars. Thus, the First Amended Information in this case was constitutionally sufficient.

2. Considering the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find it proved beyond a reasonable doubt that the respondent was guilty of violation of sex offender registration.

On appeal, the respondent contends that the evidence at the trial of this cause was not sufficient for a rational trier of fact to find it proved beyond a reasonable doubt that the respondent was guilty of violation of sex offender registration. The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Specifically, the respondent contends that the evidence was insufficient to prove that he did not actually reside at the Bolin residence during the charged period. In making this argument, the

respondent relies upon the testimony of defense witnesses who testified they had observed the respondent at that residence during that time frame or had dropped him off there. However, that assumes their credibility. It was for the trier of fact to make that credibility determination. Camarillo, 115 Wn.2d at 71.

The court specifically found in favor of the credibility of the State's witnesses. Deann Bolin testified the respondent had not resided at her home during the charged period. In response to the defense argument that the respondent resided there with David's permission but without the permission or knowledge of David's parents, an extremely unlikely scenario to begin with, David testified that this did not happen. Even David did not live at the Maxine Street residence for part of the charged period.

Further, the respondent had told Sergeant Campbell on November 12th that he was not actually living at the Maxine Street address despite having claimed that to North Thurston High School. The

respondent's motive for providing false information in this regard to both the school and the Sheriff's office was so he could continue to attend that high school and be near his girl friend.

Finally, even defense witnesses contradicted the contention that the respondent had been living at the Maxine Street address throughout the charged period. Both Justin Jensen and Gail Hanna testified that the respondent had moved to another residence around Thanksgiving. Thus, even under their version of events, the respondent had failed to comply with his notification requirements pursuant to RCW 9A.44.130 at a point during the charged period of October 25, 2005 through December 13, 2005.

The respondent argues that the term "residence", as used in RCW 9A.44.130, is ambiguous and therefore under the rule of lenity must be interpreted in favor of the respondent. State v. Stratton, 130 Wn. App. 760, 764-765, 124 P.3d 660 (2005). While that may be so, it is of

no help to the respondent in this case.

In Stratton, supra, the defendant was convicted for failing to report a change of address. However, Stratton contended on appeal that he had not moved, but was still residing at the address for which he had provided notice. The house was empty, and he was not residing in it. However, he still received mail at that address, and he still could plug into the telephone box at the property to obtain messages. He also slept most nights in his car in the driveway of that location. Stratton, 130 Wn. App. at 762-763.

The appellate court noted that the purpose of the sex offender registration law was to provide law enforcement with an address where they could contact a sex offender. Applying the rule of lenity, the court found Stratton could have been contacted at the address he claimed as his residence, either by mail, by phone, or in person at night. Therefore, that location satisfied the term "residence" for purposes of the sex offender registration law. Stratton, 130 Wn. App. at 764-

765.

However, in the present case, there was no evidence that K.D.H. received mail at the Bolin residence. While the testimony of some defense witnesses at least implied he could have been sometimes contacted by phone in the late afternoon or evening at the Bolin residence, that was refuted by Deann and David Bolin, and the court found their testimony credible.

The respondent argues that, applying the rule of lenity, even if he was staying at the Bolin residence in secret, without the knowledge of David's parents, that could still satisfy the requirement that he live at an address for which he had provided notice to the county sheriff. Assuming that is true, it is still the case that the weight of the evidence which the court found credible showed that the respondent was not residing at the Bolin house. David Bolin testified K.D.H. did not secretly stay there. In addition, K.D.H. told Sergeant Campbell that he was not staying there, despite having identified

the Maxine Street address as his residence for school records.

There was substantial evidence to support the Court's findings of fact, and those findings supported the court's conclusions of law, including the court's conclusion that the respondent did not reside at the Maxine Street address during the period of October 25, 2005 through December 13, 2005. See State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

D. CONCLUSION

Based on the above, the State respectfully requests that this court affirm the respondent's conviction for violation of sex offender registration.

DATED this 25th day of October, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

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DIVISION II

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NO. 34785-7-II

STATE OF WASHINGTON

BY CM IN THE COURT OF APPEALS
DEPUTY OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
K.D.H.,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

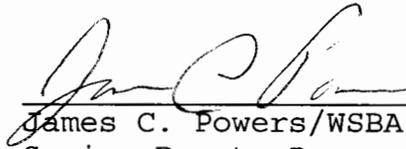
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 25th day of October, 2006, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,
Attorney at Law
P.O. Box 7269
Tacoma, WA 98406-0269

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 25th day of October, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney